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No. 02-1350

IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP
OF THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS,
Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE VENETIAN CASINO RESORT IN SUPPORT OF PETITIONER

WALTER DELLINGER
(*Counsel of Record*)
PAMELA A. HARRIS
JOSHUA WALDMAN
PAMMELA QUINN
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, DC 20004
(202) 383-5300
Attorneys for Venetian Casino Resort, L.L.C.

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INTEREST OF *AMICUS CURIAE*[1]

The Venetian Casino Resort owns and operates a luxury hotel-casino located in Las Vegas, Nevada, and has constructed a private sidewalk on its property. As the owner of a private sidewalk, Venetian is interested in the outcome to the legal question presented by the case below, namely, when—if ever—is a private sidewalk a public form? Venetian was a party in *Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937 (9th Cir. 2001), in which the Ninth Circuit held that Venetian's private sidewalk was a public forum. Venetian is now subject to this erroneous ruling, which has ongoing consequences for Venetian in its relationships with union members who wish to picket on its sidewalk. Venetian therefore has an interest in the outcome of the case below and this Court's proper resolution of the question presented.

Venetian's interest in whether the owner of a private sidewalk can regulate the speech thereon extends beyond the Ninth Circuit's erroneous holding. Because of Venetian's attempt to assert its rights as a private property owner, it is currently forced to defend itself before the National Labor Relations Board against claims that it engaged in unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Specifically, third parties sought to picket on Venetian's private property, and Venetian notified the picketers that they were trespassing on private property and unsuccessfully requested police assistance in removing

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[1] Pursuant to Rule 37.6 of the Rules of this Court, Venetian Casino Resort states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent are being filed along with this brief with the Clerk of this Court.

the trespassers who remained. As a consequence of those actions—merely asserting its right to regulate the speech by third parties on its own private property—Venetian has been charged with committing unfair labor practices, and must now defend itself in currently ongoing proceedings before the NLRB. Venetian therefore has a continuing interest in the outcome of the legal question presented in this case to vindicate its rights as a private landowner whose property is not a public forum.

SUMMARY OF ARGUMENT

There is disagreement among lower federal and state courts on a single discrete but recurring issue: when—if ever—is a *privately* owned street or sidewalk a public forum? Three courts, including the court below, have held that private sidewalks are public fora; in almost identical circumstances, one court has held to the contrary. That conflict as to outcome reflects confusion as to governing legal standards. Some courts analyze the question under the "public forum" doctrine, while others treat the issue as one of "state action." And, as explained below, that choice of analysis may well determine the outcome. Until this Court provides guidance on the proper analysis, the courts will continue to issue conflicting and ill-conceived decisions.

The Court has already granted certiorari in *Virginia v. Hicks*, *see* 123 S. Ct. 990 (2003) (granting certiorari in No. 02-371), which raises the very question at issue here. This case should, at a minimum, be held pending the resolution in *Hicks*. And in resolving *Hicks*, this Court should be cognizant of the complexity and nuances of the private-sidewalk issue as discussed below. If *Hicks* does not resolve, or only partially resolves, the issue, then the Court should grant this petition for a writ of certiorari to bring much needed clarification to this area of the First Amendment.

Whether a private sidewalk is a public forum has critical importance for the rights of private landowners to control

speech on their own property. The confusion on this issue has mistakenly led some courts—including the Tenth Circuit below—to disregard the fundamental constitutional prerogative of a private landowner to decide what speech he or she will permit on his or her premises, by treating the private landowner's property as a public forum. This Court should resolve the confusion, provide much needed guidance to lower courts, and ensure that private property owners' liberties are protected.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION WHETHER, OR UNDER WHAT CIRCUMSTANCES, A PRIVATE SIDEWALK IS A PUBLIC FORUM

A. Lower Courts Reach Conflicting Results on Whether a Private Sidewalk is a Public Forum

All courts agree that a *publicly* owned street or sidewalk is a public forum. *See Frisby v. Schultz*, 487 U.S. 474, 480 (1988). But when it comes to a *private* sidewalk, judges are deeply divided. The Tenth Circuit below held that a private sidewalk was a public forum. A panel of the Ninth Circuit did the same, but only by a divided two-to-one vote. An *en banc* panel of the Virginia Court of Appeals was even more deeply divided, with a 6-to-5 majority holding that a private sidewalk was a public forum. And the Nevada Supreme Court, also divided, reached the opposite conclusion, holding that the private sidewalk in question was *not* a public forum.

Each case arises from the same or very similar circumstances and implicates the same legal issues. In each case, there is a privately-owned sidewalk. In each case, the sidewalk in question has physical characteristics marking it as private property. In each, the public has a right-of-way easement to travel on the private sidewalk. And in each

case, the legal question is whether that private sidewalk is a public forum.

1. *Virginia v. Hicks.* In *Virginia v. Hicks*, the *en banc* majority of the Virginia Court of Appeals held that a private sidewalk was a public forum. In that case, the City of Richmond privatized the streets and sidewalks surrounding a public housing project by deeding them to the Richmond Redevelopment and Housing Authority ("Authority"), a governmental entity that acts in the capacity of a private landlord rather than as sovereign. *Hicks v. Commonwealth*, 548 S.E.2d 249, 251 (Va. Ct. App. 2001) (en banc). The sidewalk's physical characteristics were changed through the posting of "'private property, no trespass' signs." *Id.* The public retained a right-of-way across the private sidewalk. *Id.* ("the sidewalks were open to access by the public"). And "[t]he critical issue" in the case was "whether the 'privatized' streets and sidewalks are public and as such are a 'traditional public forum,' or whether they are 'private' and, thereby, a 'nonpublic forum.'" *Id.* at 253.

The majority concluded that the private sidewalk was a public forum. The court relied on the fact that the sidewalks were still used for the same public function—*i.e.*, as a public throughway—as they had been prior to privatization, as well as the absence of physical changes more significant than the posting of signs. *See id.* at 254 ("the streets appear no different from other streets in Richmond," and "serve the same function" as they did "prior to 'privatization'"). The majority also found the change in legal title—*i.e.*, the privatization—was insufficient to change the sidewalk's public forum status. *See id.* at 254 ("The City of Richmond is not permitted to transform the public streets and sidewalks . . . into private, non-public property simply by passing an ordinance declaring them closed [and] conveying them to another governmental entity.").

But the court was deeply divided. Five dissenting Judges focused not only on the posting of signs, but also on the legal conveyance of title to the Authority. *See id.* at 260 (Humphreys, J., dissenting) (the property "has been deeded from the City" to the Authority and no-trespassing signs "clearly indicated that the street and sidewalks had been privatized"). For them, continued public access was not enough to establish a public forum under the First Amendment. *See id.* (quoting *United States v. Kokinda*, 497 U.S. 720, 729 (1990)) ("even though sidewalks 'may be open to the public, [that] fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment'").

2. *First Unitarian.* The Tenth Circuit below also held that a private sidewalk was a public forum. The circumstances parallel those in *Hicks*. As in *Hicks*, the sidewalk at issue is privately-owned. *See First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1117 (10th Cir. 2002); Pet. App. 2a. Also as in *Hicks*, the sidewalk's physical characteristics were changed to mark it as private property—here, by converting the area into "an attractive plaza" with "walking areas interrupted by planters, benches, and waterfalls, a large reflecting pool, and changes in grade." *Id.* at 1119; Pet. App. 6a. And, once again, the public had a right-of-way across the private sidewalk. *Id.* at 1118-19; Pet. App. 4a-5a. Finally, the legal question at issue was framed as it had been in *Hicks*: whether a private sidewalk is a public forum. *Id.* at 1121; Pet. App. 10a ("[t]he City and LDS Church maintain the easement cannot be a public forum").

The court below held that the private sidewalk was a public forum. Again, the court focused on the fact that the sidewalk continued to serve the public function of a pedestrian throughway. *See id.* at 1126; Pet. App. 18a ("[t]he actual purpose . . . here is a pedestrian throughway for the general public"). Nor did the court find the change in legal title

to be persuasive. *See id.* at 1124; Pet. App. 15a ("The government cannot simply declare the First Amendment status of property regardless of its nature and its public use."). And it was important to the court that the property had previously been publicly held: "the easement remains a public forum precisely because the property was previously a public forum and it has not been sufficiently altered to destroy that status." *Id.* at 1130; Pet. App. 25a-26a.

3. *Venetian.* The Ninth Circuit has also held that a private sidewalk was a public forum. In *Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937, 939 (9th Cir. 2001), like the two cases just discussed, the sidewalk at issue is privately-owned. *See id.* at 943 ("In this case, the title to the property was held by the Venetian . . ."). And like those cases, the sidewalk's physical characteristics were changed to mark it as private property—specifically, the Venetian "mark[ed] its property lines and erected signs stating that the pedestrian walkway was private property." *Id.* at 940. And, once again, the public had a right-of-way across the private sidewalk. *See id.* at 942 (private sidewalk "is to provide unobstructed pedestrian access"). Finally, the legal question at issue was the same as in the two cases above: whether a private sidewalk is a public forum. *Id.* at 943.

The Ninth Circuit agreed that the private sidewalk was a public forum. Once again, the Ninth Circuit focused on what it considered to be an absence of sufficient physical changes, *see id.* at 945 ("there are no barriers or other physical boundaries"), as well as the sidewalk's continued use as a public throughway, *see id.* at 944 (sidewalk "still performs the same role as a thoroughfare for pedestrian traffic"). The court relied on "the sidewalk's history as a public forum," *id.* at 944, rather than the fact that "title to the property was held by the Venetian," *id.* at 943, and held that the sidewalk would cease to be considered public only if its "character or

its use" was "fundamentally altered," which, the court found "has not happened here," *id.* at 944.

Judge Brunetti dissented. For him, the legal question is not whether a public forum has been closed, but "whether a private party's actions are fairly attributable to the State" because "the private actor has assumed a traditionally public function" and thereby become a state actor. *Id.* at 952 (internal quotation marks and citation omitted). Distinguishing *Marsh v. Alabama*, 326 U.S. 501 (1946), as a case where a "company town performed *all* municipal functions and therefore was found to be a state actor," *id.* (emphasis added), Judge Brunetti concluded that "[t]he mere fact that the Venetian's sidewalk is open to the public generally and therefore performs the same function as a public sidewalk is not sufficient without more to subject the property to constitutional standards." *Id.* at 953.

4. *Mirage.* The Nevada Supreme Court, in contrast, has *rejected* claims that a private sidewalk is a public forum. In *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001), the sidewalk at issue is privately-owned. *See id.* at 245. And as in the previously-discussed cases, the sidewalk's physical characteristics were changed to mark it as private property—specifically, "[s]igns are posted at various points along the sidewalks indicating that they are the private property of the Mirage." *Id.* And, once again, the public had a right-of-way across the private sidewalk. *See id.* Finally, the legal question, once again, is whether a private sidewalk is a public forum. *See id.* at 248.

But the Nevada Supreme Court held that the private sidewalk was *not* a public forum: "Privately-owned property does not lose its private nature because the public traverses upon it." *Id.* at 248. Like Judge Brunetti's dissent, the Court examined whether the Mirage has "functionally assumed the role of the government" warranting "the application of the state action" doctrine. *Id.* at 247. And like Judge Brunetti,

the Court distinguished *Marsh v. Alabama* and held that the Mirage and its private sidewalk were not subject to constitutional constraints. *Id.* at 248.[2]

One Justice dissented, opining that "the very location and function of the sidewalks" makes it "impossible not to conclude that they serve as traditional public sidewalks," and thus "public forums." *Id.* at 252 (Rose, J., dissenting). "[W]hether publicly or privately owned" the dissenting Justice believed they are public forums, for "[t]he sidewalks at issue . . . function in every other respect as traditional public sidewalks," and a public sidewalk is always a public forum. *Id.* at 252-54.

B. Lower Courts Use Conflicting Approaches to Analyze Whether a Private Sidewalk is a Public Forum

1. The different outcomes described above might be tolerable if they arose from uniform application of a fact-intensive legal standard to varying circumstances. But that is not the case. As already shown, the facts of these cases are strikingly similar. More important, the courts are divided not only as to outcome, but also as to the proper legal analysis. And the choice of analytic framework is critical, for one approach presumes, absent exceptional circumstances, that free speech restrictions *do apply*, and the other presumes that First Amendment restrictions *do not* apply. In short, the choice of analysis may well be outcome determinative.

If the question is framed in "public forum" terms, as some courts do, then the starting premise is that free speech

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[2] Two Justices concurred on the ground that the speech in question was commercial. *Id.* at 252 (Maupin, C.J., concurring). As Petitioner explains (Pet. 15 n.5), the plurality decision reflects the holding of the Nevada Supreme Court because "the reasoning and holding of the plurality view" is considered "binding unless and until overruled by three or more Justices." *Craigo v. Circus-Circus Enters., Inc.*, 786 P.2d 22, 28 n.7 (Nev. 1990).

restrictions apply. For these courts, a public sidewalk is the "archetype" of a traditional public forum, *see Frisby v. Schultz*, 487 U.S. 474, 480 (1988), and presumptively subject to First Amendment constraints. While "the government always retains the authority to close a public forum, *by selling the property*, changing its physical character, or changing its principal use," to do so the State "must alter the objective physical character or uses of the property . . . to change the property's forum status." *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 699-700 (1992) ("*ISKCON*") (Kennedy, J., concurring in the judgment) (emphasis added). Because "it is critical that we preserve these areas for protected speech," *id.* at 698, "when property is a protected public forum the State may not by fiat assert" that a public forum is closed, but must "bear the attendant costs" of proving a "change [of] the property's forum status," *id.* at 700. As a result, private sidewalks that still look like and are used as public throughways are governed by the First Amendment.

Courts approaching the issue as one of "state action," on the other hand, begin with the opposite presumption. Those courts understand that starting with the "public forum" approach skips the critical first step, for public forum analysis does not even apply at all until it is determined that First Amendment restrictions are even implicated—and that does not occur unless there is state action. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government," not abridgment by private parties. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). Because the First Amendment does not impose restrictions on a private party, "a private owner of property . . . has power to preserve the property under its control for the use to which it is lawfully dedicated," *Green v. Spock*, 424 U.S. 828, 836 (1976), including restrictions on speech. That presumption may be overcome when a private party so assumes traditional governmental functions that it

becomes a "state actor." But that very narrow exception does not extend to private ownership of streets or sidewalks that do not amount to a "company town" as in *Marsh v. Alabama*. As a result, speech restrictions on private streets and sidewalks do not raise any First Amendment problem at all.

2. The cases discussed above disagree as to which analysis to apply—and indeed, sometimes appear not to understand the difference between the two. Both the court below and the Ninth Circuit, for instance, apply "public forum" doctrine, and frame the inquiry as whether the government has taken sufficient steps to close a formerly public forum. *First Unitarian*, 308 F.3d at 1130 (Pet. App. 25a-27a); *Venetian*, 257 F.3d at 943-45. Both courts quote and rely on Justice Kennedy's concurring opinion in *ISKCON*, 505 U.S. at 700, for the proposition that the government may change a property's public forum status only by altering "the objective physical character or uses of the property." *See First Unitarian*, 308 F.3d at 1131 (Pet. App. 27a); *Venetian*, 257 F.3d at 944. And, not surprisingly, both courts hold that the sidewalks in question, still open to the public as throughways, are not so changed that they have lost their public-forum character. *See First Unitarian*, 308 F.3d at 1131 (Pet. App. 27a); *Venetian*, 257 F.3d at 944-45.

Though the issue is never joined expressly, Judge Brunetti takes a very different approach in his Ninth Circuit dissent, treating the issue as one of "state action." That is enough to reverse the presumptions, so that the First Amendment is not implicated unless operation of a sidewalk is enough to transform a private party into a state actor under *Marsh v. Alabama*'s "public function" rule. *Venetian*, 257 F.3d at 952-53. Given the narrowness of the *Marsh* exception, it is again not surprising that Judge Brunetti should reach a conclusion different than the majority's, and argue against subjecting the private sidewalk to constitutional constraints. *Id.*

Similarly, both the Nevada Supreme Court and Virginia Court of Appeals appear to engage in a "state action" analysis of the private sidewalks in question. For the Nevada Court, for example, the relevant question is whether the Mirage has "functionally assumed the role of the government" in owning and maintaining a sidewalk. 23 P.3d at 247. Under *Marsh*, as narrowed by subsequent decisions, the answer is no. *Id.* at 247-48; *see also id.* at 248 (private sidewalk is not public forum in part because "no state action has occurred"). Though the Virginia Court of Appeals comes to a different conclusion, it, too, analyzes the issue in terms of state action, finding that the City cannot "privatize" its streets and sidewalks simply by conveying them to a different governmental entity. *See* 548 S.E.2d at 254, 255 (citing *Marsh*).

In short, the courts are divided not only with respect to outcome, but also with respect to the appropriate analysis. And the choice of analysis, though not dispositive in every case, tilts a court's starting presumptions in a way that does much to determine the result. Unless this Court steps in to clarify the standards that govern, this area will continue to be marked by conflicting and seemingly arbitrary decisions. Moreover, if this Court grants certiorari to decide whether a private sidewalk is a public forum, it should—and necessarily must—decide which analysis should be employed to answer that question. The analytical choice is inseparably intertwined with—and logically antecedent to—the legal conclusion that the Court would reach.

C. The Petition Should be Held Pending the Decision in *Virginia v. Hicks*

One of the questions presented by *Hicks* asks the Court to decide whether (and how) the State may sell or privatize streets and sidewalks and thereby close what was previously considered to be a public forum. Indeed, as characterized by petitioner, *Hicks* raises precisely the same issue as is raised

in this petition: "essentially a question of whether sidewalks [that have been deeded] are constitutionally different from common ordinary sidewalks along a public street." Reply Br. of Pet. at 2 (No. 02-371).

The Court should therefore hold this petition pending the decision in *Hicks*. If *Hicks* does not resolve the question presented in this case, then this Court should grant the petition to consider the important question of whether a private sidewalk is a public forum. *Hicks* could be decided, that is, on overbreadth grounds, an alternative question presented in the petition. Even if the Court reaches the public forum question, the Court might resolve it on the narrow grounds that a sidewalk does not become "private" merely because the government has deeded it to *itself* in its landlord capacity. In either case, the Court should grant this petition to resolve the First Amendment status of sidewalks that are *truly privately-owned*—an issue on which there would remain conflicting decisions and substantial confusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, at a minimum, held pending the outcome of *Virginia v. Hicks*, No. 02-371.

Respectfully submitted,

WALTER DELLINGER
(*Counsel of Record*)
PAMELA A. HARRIS
JOSHUA WALDMAN
PAMMELA QUINN
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

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